

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

MIGUEL R.,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

OAH Case No. 2010070188

DECISION DENYING THE APPEAL

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 2, 2011, in Pomona. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Miguel R. (Claimant), who was briefly present when he testified, was represented by his foster mother, who was assisted by an interpreter.¹ Claimant's foster mother was also assisted by Lina Morales, Social Worker, Los Angeles County Department of Children and Family Services (DCFS).

The San Gabriel/Pomona Regional Center (Service Agency) was represented by Daniela Martinez, Fair Hearing Manager.

ISSUE

Does Claimant have a developmental disability (autism or the fifth category) making him eligible for regional center services under the Lanterman Developmental Disabilities Services Act?

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a 14-year-old male on whose behalf regional center services were requested from the Service Agency by his DCFS social worker on or around June of 2010.
2. By a Notice of Proposed Action dated June 17, 2010, Claimant's foster mother, as well as the social worker who initiated the eligibility request, were advised that Service Agency staff had deemed that Claimant did not have any of the five qualifying developmental disabilities and therefore concluded that he was not eligible for services.
3. On or about June 23, 2010, a Fair Hearing Request on Claimant's behalf was submitted, by which the Service Agency's denial of eligibility was appealed.

Claimant's Background

4. Claimant is a ward of the court. He and his siblings were removed from his biological parents due to domestic violence and possible drug abuse. Claimant has lived with his foster parents since he was two. An older brother had also been placed with the same foster family, but he recently left home and joined the military.
5. Because of his being uprooted, little is known of Claimant's early development. His foster mother notes that he has been delayed in all major categories as long as she has known him.
6. Claimant is now in the fifth grade of his local school district, where he receives special education services. As described in more detail below, he is currently eligible for such services under the category of emotionally disturbed (ED).

The Service Agency's Assessment of Claimant

7. Claimant was first referred to the Service Agency by his DCFS social workers in 2001, when he was four years old. He was suspected of having autism. On March 12, 2001, Service Agency Intake Coordinator Gabby Castillo met with Claimant and his foster mother to conduct a social assessment of Claimant. Ms. Castillo thereafter recommended a psychological evaluation be conducted, as well as review of pertinent records.
8. The Service Agency referred Claimant to Clinical Psychologist Victor C. Sanchez, Ph.D., for a psychological evaluation, which was conducted on March 9, 2001. Dr. Sanchez took a clinical interview of Claimant and his foster mother, reviewed records, and administered a number of tests focused on Claimant's intellectual skills, adaptive skills, and the presence of any traits associated with autism. In his report from that evaluation, Dr. Sanchez gave Claimant a provisional diagnosis of Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS), because although Claimant's mother reported a series of

symptoms and behaviors suggestive of that disorder, Dr. Sanchez did not observe the same during the evaluation and could not make that diagnosis. He also ruled out a diagnosis of Autism Disorder, primarily for the same reason, i.e., he did not observe any features or behaviors consistent with that disorder. However, Dr. Sanchez detected some aggressive behaviors and ideations, which indicated to him that Claimant's situation had an overlay of an unspecified emotional disturbance, perhaps oppositional/defiant disorder, which should be further evaluated by a mental health specialist.

9. Service Agency staff had also obtained special education records for Claimant completed in 2001. Those records uniformly show Claimant's cognitive skills to be in the average-to-low-average range. The reports indicated that some of Claimant's delays could be explained by a delay in language and auditory processing. Because his actual performance was less than his potential, he was deemed to have a learning disorder and thus was eligible for special education services. There is no indication in those records that autism or mental retardation were suspected.

10. Dr. Deborah Langenbacher, Ph.D., a Service Agency staff psychologist, conducted a review of Claimant's file and records, including Dr. Sanchez's evaluation report. She also contacted Dr. Valdes, a psychiatrist who had been treating Claimant for behavior problems at the time. Her chart notes indicate that Dr. Valdes "doubts autism is a correct diagnosis." Dr. Langenbacher felt impulsivity and psychological issues were Claimant's greatest areas of concern. She concluded that Claimant did not have autism or any other condition making him eligible for regional center services.

11. On June 14, 2001, an Interdisciplinary Eligibility Team Conference was conducted by Service Agency staff to determine Claimant's eligibility for services. The above-described information was reviewed and discussed, as well as other information and records obtained by the Service Agency. The committee concluded that Claimant was not eligible for regional center services, because he did not meet the criteria for autism, his low-average cognitive skills ruled out mental retardation, and there was no evidence of cerebral palsy, epilepsy or a fifth category condition. Claimant's foster mother and his DCFS social workers were advised of that decision, which was not appealed and became final.

12. Claimant's foster mother and social workers have provided to the Service Agency special education records from 2006, 2009 and 2010, with the goal of shedding more light on Claimant's situation and to facilitate a reevaluation of Claimant's eligibility for regional center services.

13. The school's 2006 psychoeducational report indicates that Claimant had been dismissed from special education in 2004 because he no longer met the criteria of a learning disorder, only later to be readmitted under the category of emotional disturbance. The report also shows Claimant had mixed cognitive and academic skills, ranging from low average in reading, average to low average in math, and low average to well below average in overall intellectual functioning. The Gilliam Autism Rating Scale (GARS) was administered to Claimant, which indicated there was a low probability of his having autism. The GARS was

used because school staff had information indicating that Dr. Valdes had diagnosed Claimant with autism sometime in 2006. However, no report or records from Dr. Valdes were submitted, and the conversation Dr. Langenbacher had with Dr. Valdes described above, as well as the results of the GARS, undercut the validity of that note in the report. Moreover, Claimant's teacher specifically noted that she did not observe Claimant engage in any autistic-like behaviors at school.

14. Special education records from 2009 and 2010 contain information similar to the 2006 report. Claimant was still eligible for special education services based on the emotional disturbance category. His cognitive and academic test results still showed scattered scores ranging from average, to below average, to well below average. His full scale IQ score from testing in 2009 was 88. The cut-off for mental retardation is a full-scale IQ score of 70. Scores in the low to mid 70s are considered borderline. Claimant's speech and language scores are described as "within the average range." There is no notation that autism or mental retardation is suspected.

15. Service Agency staff reviewed the school records from 2006-2010, including Intake Coordinator Elizabeth Givhan and Dr. Langenbacher. Those who reviewed these school records did not believe they showed any significant change in Claimant's situation then from the Service Agency's prior evaluation in 2001. Therefore, the Service Agency denied the request for eligibility made by Claimant's DCFS social worker described above in Factual Finding number 1, which was essentially a request by the social worker for the Service Agency to "reconsider" its past denial of services in 2001.

Claimant's Evidence

16. Claimant's foster mother testified in this matter. She believes Claimant is autistic and needs help. She describes Claimant as having the mind of a nine-year-old despite being a teenager. She says he has no friends and is not able to effectively communicate with others. According to her, he is not able to dress or bath himself, and has few independent living skills. Because school does not offer services geared toward life at home or in the community, Claimant's foster mother believes the Service Agency should help.

17. Claimant's current DCFS social worker, Lina Morales, also testified. She is critical of the Service Agency's failure to conduct evaluations or assessments of Claimant regarding his most recent request for services. She describes Claimant as having no adaptive skills, no independent living skills, very little communication skills, no social skills, and borderline intellectual functioning. She testified that he resembles a person with mental retardation, in that he must be directed to task, taught step-by-step, and even then will forget what he was just shown.

18. Claimant also testified briefly. He is soft spoken and sometimes does not fully or correctly pronounce words. He made direct eye contact with those questioning him and

was directly responsive to all questions. He behaved appropriately and seemed to appreciate the seriousness of the proceedings.

19. A report issued in September of 2010 from the Children's Bureau was presented. Claimant has been receiving mental health services from the Children's Bureau since 2006. He has attended therapy sessions sporadically and been prescribed psychiatric medications. He has been diagnosed with a mood disorder, as well as attention deficit/hyperactivity disorder (ADHD) not otherwise specified (NOS). However, staff has also determined to rule out a psychotic disorder NOS for Claimant.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.²) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-3.)

2A. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits) The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

2B. With regard to the issue of eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the claimant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that claimant was not eligible. (*Id.* at p. 1137.)

2C. Based on the above, Claimant in this case has the burden of proving by a preponderance of the evidence that his evidence regarding eligibility is more persuasive than the Service Agency's.

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

Claimant Did Not Establish that He has a Qualifying Condition

3. An applicant is eligible for services under the Lanterman Act if he can establish that he is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is referred to as the fifth category (a condition similar to mental retardation or which requires treatment similar to that required by those who are mentally retarded). (§ 4512, subd. (a).) A qualifying condition must also onset before one's 18th birthday and continue indefinitely thereafter. (§ 4512.)

4. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he has the qualifying condition of autism. No school psychologist, health care provider or psychological evaluator has diagnosed Claimant with autism. However, one test administered to Claimant used to identify the presence of autistic traits, the GARS, showed Claimant had a low probability of having autism. There is little evidence in the record of the type of communication problems, repetitive behaviors, or intense interests typical of autism. What Claimant does have is a constellation of various diagnoses, including PDD-NOS (provisionally), mood disorder, ADHD, and possibly a psychotic disorder. Any one or combination of these maladies could explain Claimant's poor functioning. The anecdotal opinions of Claimant's foster mother that Claimant is autistic do not sufficiently refute the opinion presented by the Service Agency's experts that Claimant is not autistic. (Factual Findings 4-19.)

5A. The "fifth category" is described as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals." (§ 4512, subd. (a).) A more specific definition of a "fifth category" condition is not provided in the statutes or regulations. Whereas the first four categories of eligibility are very specific (e.g., autism or cerebral palsy), the disabling conditions under this residual fifth category are intentionally broad so as to encompass unspecified conditions and disorders. But the Legislature does require that the condition be "closely related" (§ 4512) or "similar" (Cal. Code Regs., tit. 17, § 54000) to mental retardation. "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." (*Mason v. Office of Administrative Hearings, supra*, 89 Cal.App.4th at p. 1129.)

5B. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he has the qualifying condition of the fifth category condition. His cognitive abilities are clearly in the average to low-average range, and well beyond the range of mental retardation. Claimant's recent full scale IQ of 88 puts him well beyond the borderline intellectual functioning level generally considered closely associated to mental retardation. Though he is delayed in many areas of academic and cognitive functioning, those delays can just as equally be explained by his various mental health diagnoses. His school or medical records do not depict him as a person who behaves or functions similar to a mentally retarded person. Nor was it established that the services Claimant currently needs are similar to those required by a mentally retarded person. (Factual Findings 4-19.)

6. Since Claimant failed to establish by a preponderance of the evidence that he has any of the five qualifying developmental disabilities, he failed to establish a basis of eligibility for regional center services under the Lanterman Act. (Factual Findings 1-19.)

ORDER

Claimant Miguel R.'s appeal of the San Gabriel/Pomona Regional Center's determination that he is not eligible for regional center services is denied.

DATED: May 25, 2011

ERIC SAWYER,
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.